the said land and premises and claimed to have paid assessment from 1951, it was clearly open to the trial judge to find that she had found them in the temple.

In fact, having regard to the view which he formed of the credibility of the appellant and the respondents respectively, after seeing them in the witness-box, it seems to me that it would be otiose to examine in detail the reasons why the trial judge rejected the appellant's version of the various different factual situations adduced by her in support of her claim to long possession. There were more than ample reasons for regarding her as a highly dubious witness and for doubting her veracity as well as that of her brother-in-law, Ong Lian Kee.

Finally, one further ground, perhaps requires an expression of my views. Complaint was made that the pleadings were allowed to be amended at the instance of counsel for the respondents after the appellant's case had become known. I do not consider that there is any merit in this ground. There was a clear discretion to allow such an amendment and, in my opinion, it was properly exercised notwithstanding the untenable claim that the appellant was prejudiced thereby. I cannot see how she could have been prejudiced at all because her claim was to possession from 1928. Any amendment affecting any period subsequent to 1950 could not have embarrassed her at all because if her story were true she would have already proved adverse possession for 22 years prior to 1950. Moreover, any admission in paragraph 2 of the defence before amendment did not necessarily involve an admission that she had continuously been in possession after 1950 so as to take her by surprise with evidence that, even after 1950, her possession had been intermittent.

It is regrettable that this case has taken such a long time to reach its conclusion. Proceedings commenced in 1961 and concluded in early 1965. The appellant could never have become the owner of the land and premises because on her own showing (as she claimed in her Income Tax returns) she was merely an agent of the temple. In my opinion she was in no better a position than an intermeddler in a public trust of a clearly charitable nature, of which there was overwhelming evidence, documentary and otherwise. It is well-known that a public trust can never fail for want of a trustee as long as the trust is capable of performance. How any claimant such as the appellant could have possibly hoped to succeed in permanently excluding from the said land and premises the trustees of a trust for religious advancement, being one obviously designed to benefit the public or at least a substantial section of the public, is beyond understanding.

The appeal is accordingly dismissed.

Tan Ah Tah Ag.C.J. and **Buttrose J.** concurred.

Appeal dismissed.

Solicitors: *Lee & Lee; S. K. Lee.*

PERIASAMY v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Ong Hock Thye F.J. and Ismail Khan J.) November 6, 1965]

[K.L. — Federal Court Criminal Appeal No. X 2 of 1965]

Criminal Law and Procedure — Trial — Witness lying on one or two points — Not reliable witness — Evidence of independent witness — Whether finding of fact of trial judge can be disturbed.

The appellant with four others were accused of being members of an unlawful assembly, the common object of which was to cause harm to one *R*. On the categoric evidence of the appellant that the co-accused had nothing to do with the events alleged to have taken place the learned trial judge acquitted the other accused and amended the charge against the appellant to one of causing voluntarily grievous hurt to *R* with a parang. The learned judge then referred to the contradictions and discrepancies in the evidence for the prosecution and stated that he was satisfied that the appellant had voluntarily caused grievous hurt to *R*. On appeal,

Held: the evidence of the complainant required close scrutiny in the context of the rest of the evidence for the prosecution and the defence and in the circumstances of this case as the evidence of the independent witness (a police constable) did not support the evidence of the complainant, the conviction should be quashed although in doing so the appellate court would be drawing its own inference from the facts and would be coming to a finding different from that of the trial judge.

Cases referred to:—

(1) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105, 107.

(2) *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326.

(3) *Mersey Docks & Harbour Board* v. *Procter* [1923] A.C. 258.

FEDERAL COURT.

R. Tallalla for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Ismail Khan J.: The appellant was in the first place tried on a charge that he with four other accused being members of an unlawful assembly, the common object of which was to cause hurt to one Ramasamy, one of their members caused grievous hurt to the said Ramasamy with a parang and thereby committed an offence under sections 149 and 326 of the Penal Code.

Substantive evidence of the primary facts was given by Ramasamy himself supported by close members of his family, viz. his younger brother Maniam (P.W.2), his son Muniandy (P.W.4) and mother Thanapackiam (P.W.5). Since, however, Ramasamy himself categorically stated that none of the other four co-accused had

said or done anything at all in the events alleged to have taken place, the learned trial judge at the close of the prosecution case was compelled to hold that these co-accused had no *prima facie* case to answer. They were accordingly acquitted and discharged. In the result the charge against the appellant as sole remaining accused was amended to one of voluntarily causing grievous hurt to Ramasamy with a parang in contravention of section 326 of the Penal Code. On that charge he was duly convicted and sentenced to three years' imprisonment. He now appeals against his conviction and sentence.

In his judgment the learned trial judge said:—

"At the end of the case I gave the whole of the evidence very careful consideration. I had in mind the various discrepancies in the evidence of the prosecution witnesses. I had in mind what I considered to be a demonstrable lie about P.W.1 having taken no alcohol on the day in question. However, notwithstanding such contradictions, discrepancies and lies, I was satisfied, as I stated at the end of the case, that the accused voluntarily caused grievous hurt to Ramasamy."

From the above quotation two facts emerge. In the first place the evidence of Ramasamy required close scrutiny in the context of the rest of the evidence, both for the prosecution and the defence.

In 1961 the then Court of Appeal comprising the same members as this court, said in *Khoon Chye Hin* v. *Public Prosecutor*:— [1]

"If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion."

In the second place, by contrast, the evidence of police constable No. 12428 (P.W.6) was accepted by the learned trial judge as that of "the one independent witness in this case."

In our view the evidence of this independent witness ought to have been preferred as carrying more weight to that of Ramasamy himself and other members of his family who were described as partisan witnesses where there was any contradiction. In one material particular, the very essence of the offence there clearly was a conflict of evidence. The police constable stated that the weapon he actually saw the appellant carrying was a stick. Unless his evidence was accepted with reservations — which it was not — it goes without saying that a stick is not an instrument for cutting and specifically not a parang, so that the appellant could not have caused the incised wounds sustained by Ramasamy. On this point alone we think that the charge was not made out and the appellant should have been acquitted.

It was suggested by the learned Deputy Public Prosecutor that it was possible for the appellant to have been carrying both a parang and a stick or to have discarded the parang and picked up the stick which he was seen carrying by the police constable. According to the evidence, however, no one saw him do either of these and no parang if discarded was ever found. This court therefore must confine itself strictly to the evidence on the record rather than indulge in surmise. In other words, where a conflict of evidence arose, should not the logical choice have been the evidence of the independent witness whose credit stood unshaken? It is true that we are differing from a finding of fact by the learned trial judge. Nevertheless, our decision does not run counter to the principle enunciated in *Benmax* v. *Austin Motor Co. Ltd.* [2] where Viscount Simonds L.C. quoted with approval what had been said by Viscount Cave L.C. in *Mersey Docks & Harbour Board* v. *Procter*:— [3]

"The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly."

A close perusal of the record abundantly establishes that there has been a general melee in which Ramasamy came by his wounds rather than an unprovoked wounding when he refused to yield to an extortion demand for money. If Ramasamy's story were true, then there is no accounting for the injuries received by at least three other persons who never were in the picture at all. On the other hand, their injuries and those of Ramasamy, and indeed everyone referred to, were consistent only with a fight. The learned trial judge himself described the encounter as a fight. Ramasamy's witnesses were no better witnesses of the truth. For instance, there was the purported identification by Maniam (P.W.2) of five complete strangers whom he saw for the first time, in circumstances of great excitement, at great personal danger to himself but of whom he gave minute details what exactly each of the five had armed himself with. For anybody that was an incredible performance.

For the reasons above stated, this appeal is allowed and the conviction quashed.

Appeal allowed.

Solicitors: *Talalla and Menon.*